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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 940

ANASTASIO A. YLAGAN, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 6–7) is not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered on March 6, 1944 (R. 7). The petition for writ of certiorari was filed on April 28, 1944. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939, 28 U. S. C. sec. 288 (b).

QUESTION PRESENTED

Whether petitioner's suit for damages on account of his alleged improper dismissal from the Federal service and for alleged underpayment of salary prior to discharge, brought more than eight years after such discharge, was barred by Section 156 of the Judicial Code requiring that suit on a claim against the United States be brought "within six years after the claim first accrues."

STATEMENT

Petitioner brought suit in the Court of Claims on September 4, 1943, to recover damages for his alleged improper dismissal from the Federal civil service and for salary allegedly due prior to dismissal. The petition alleged (R. 1–5) that petitioner was employed by the United States as a janitor in the Post Office at Los Angeles, California, from July 1, 1929, to July 7, 1935; that he was entitled to an entrance salary of $1,320 per annum, but was paid only $1,020 the first year and $1,080 per annum thereafter; and that he was improperly removed from office by the new postmaster on July 7, 1935.

The United States moved to dismiss the petition (R. 5) on the ground that the action was barred by the statute of limitations (Sec. 156 of the Judicial Code; 28 U. S. C. 262), which provides in part:

> Every claim against the United States cognizable by the Court of Claims shall be

> forever barred unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the Secretary of the Senate or the Clerk of the House of Representatives, as provided by law, within six years after the claim first accrues.

The Court of Claims granted the motion and dismissed the petition (R. 7).

ARGUMENT

The Court of Claims properly held (R. 7) that petitioner's claim for salary and damages accrued not later than 1935, when suit thereon could first have been brought, and hence was barred by the six-year statute of limitations.[1]

1. Petitioner's alleged cause of action for back salary accrued when the salary would have been payable, i. e., not later than July 7, 1935, when petitioner was dismissed.[2] *Howard University* v.

[1] While petitioner also prayed reinstatement, the court below properly declined to consider this question, since the jurisdiction of the Court of Claims is confined to the rendition of money judgments. Act of March 3, 1887, 24 Stat. 505, 28 U. S. C. 250; see *United States* v. *Sherwood*, 312 U. S. 584, 588; *United States* v. *Jones*, 131 U. S. 1, 18.

[2] Since the petitioner's action was brought more than eight years after his dismissal from service, there is no occasion to consider whether his last salary installment became payable on the day of removal or at the end of the month or other pay period. Cf. *Smith* v. *United States*, 98 C. Cls. 392, 396. Government employees whose compensation is fixed on an annual basis (as was petitioner's) are paid semi-monthly. See 20 Comp. Gen. 834; Op. of Comp. Gen. B-40532, March 18, 1944.

Cassell, 126 F. (2d) 6, 9 (App. D. C.), certiorari denied, 316 U. S. 675; *Withers* v. *United States,* 69 C. Cls. 584, 587. Likewise, his claim for damages on account of improper dismissal from the service accrued on July 7, 1935, the date of the dismissal. *Nicholas* v. *United States,* 257 U. S. 71; *Norris* v. *United States,* 257 U. S. 77; *Caswell* v. *Morgenthau,* 98 F. (2d) 296 (App. D. C.), certiorari denied, 305 U. S. 596; *O'Neil* v. *United States,* 56 C. Cls. 89; *Johnson* v. *United States,* 87 C. Cls. 270. Consequently, the petition, which was filed on September 4, 1943 (R. 1), was barred because not filed "within six years after the claim first accrues." Jud. Code § 156; 28 U. S. C. 262.

2. Petitioner admitted below that his petition was not filed within the six-year period prescribed by the statute, but, in the language of the court below, sought "to avoid the effect of the statute by setting forth the industry with which he pursued what he honestly believed to be his remedies, *viz.,* claims or complaints to the Civil Service Commission, the Postmaster General, the Congress, the Comptroller General, the Treasury Department, and others, and suits in other courts, all to no avail" (R. 6). In this connection, petitioner argued below, as he does here, "that the statute did not begin to run until July 11, 1941, when, as he alleges, his last suit against the United States was dismissed for lack of jurisdic-

tion" (R. 6). The court below properly rejected this contention on the ground that the statute was "not tolled by the failure of other supposed remedies" (R. 7). The submission of a claim to a Government department will suspend the running of the statute of limitations only if such submission and departmental action on the claim are conditions precedent to the claimant's right to institute court proceedings. *United States* v. *Utz*, 80 Fed. 848 (C. C. A. 3); *Kennedy* v. *United States*, 79 Fed. 893 (C. C. N. Y.), affirmed on other grounds 95 Fed. 127 (C. C. A. 2); *Moriarity* v. *United States*, 97 C. Cls. 338; *Battelle & Evans* v. *United States*, 7 C. Cls. 297. Nothing in the statutes or rules relating to employment in the Federal civil service or, more specifically, in the Post Office Department, suggests that a discharged employee must request reconsideration of his dismissal before instituting court action.[3]

[3] Section 6 of the Act of August 24, 1912 (c. 389, 37 Stat. 555, 5 U. S. C. 652) prohibits removal of persons "in the classified civil service of the United States * * * except for such cause as will promote the efficiency of said service and for reasons given in writing". It requires that the employee be given notice that his removal is sought "and of any charges preferred against him," and be allowed "a reasonable time for personally answering the same in writing * * * but no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer making the removal". The petition for certiorari discloses (pp. 26–27) that prior to petitioner's removal he was given the required notice and "instructed to make a written reply" to the charges.

CONCLUSION

The judgment below is clearly right. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944